

## STATEMENT OF THE CASE

### ISSUES

The preliminary hearing Order found claimant sustained a compensable right shoulder injury and was entitled to medical treatment. The ALJ ordered payment of claimant's medical bills incurred after August 2, 2012, and temporary total disability benefits from August 1 through 12, 2012, and January 30 through March 5, 2013.

Claimant asks the Board to affirm the preliminary hearing Order.

The preliminary hearing Order listed four issues: timely notice, whether claimant met with personal injury by accident arising out of and in the course of his employment with respondent and is entitled to medical treatment, payment of medical bills incurred by claimant and whether claimant was entitled to temporary total disability payments. Respondent's application for review listed two issues: whether claimant's alleged injury arose out of and in the course of his employment with respondent and whether the ALJ exceeded her authority in granting claimant benefits. Respondent's brief listed only one issue on appeal: "Whether Claimant met his burden of proof that it is more likely than not he suffered an accidental injury to his right shoulder that arose out of and in the course of his employment on June 11, 2012."<sup>1</sup> Therefore, that is the only issue this Board Member will consider on appeal.

### FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant sustained an ankle injury, for which he filed a claim in Docket No. 1,060,138. All depositions taken were in that claim, but contain testimony and evidence concerning claimant's right shoulder injury that gave rise to Docket No. 1,069,634. As stated above, the parties agreed the evidence taken in Docket No. 1,060,138 shall be considered as part of the record in Docket No. 1,069,634.

Claimant testified he injured his right shoulder while unloading a truckload of newspaper rolls weighing 700 to 900 pounds each. As he loosened the newspaper rolls from each other, they began falling. Claimant tried to hold one of the newspaper rolls with his hand and felt a pop in his right shoulder. He testified he was unloading the truck with a co-worker by the name of Vince or Vic. Claimant's supervisor was not present, so claimant continued unloading the truck and moving the newspaper rolls. Claimant testified he reported the accident the same day to his supervisor, Jerry Naab. Claimant also testified he reported the accident approximately two days after it occurred. Claimant first testified he believed the right shoulder injury occurred in June 2012. He testified he again

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<sup>1</sup> Respondent's Brief at 1.

reported his right shoulder injury to Mr. Naab a week after the accident, because he could not take the pain any longer. According to claimant, Mr. Naab indicated there was no one in Human Resources to whom the accident could be reported.

Claimant indicated he sought treatment on his own at Siena Medical Clinic on July 5, 2012. Nurse Practitioner Mary White's notes at Siena indicated claimant denied any injury and the right shoulder pain had been ongoing for three to four weeks. Ms. White's impression was right shoulder musculoskeletal pain. Claimant testified he told Ms. White exactly how the right shoulder injury occurred.

Claimant indicated he next sought treatment for his right shoulder from Dr. Jeremy Presley on July 12, 2012. The doctor diagnosed claimant with right shoulder strain/AC strain, prescribed medication and physical therapy and took him off work until July 20, 2012. Notes from that visit listed the mechanism of injury as: "unknown, he had been lifting at work but he isn't sure it happened there. He said he doesn't really know what happened."<sup>2</sup> Claimant indicated he also saw Nurse Practitioner Marcia Snodgrass, who eventually referred claimant to Dr. Erik L. Severud.

Claimant testified he eventually reported the accident to Kerri Powers<sup>3</sup> in Human Resources. Claimant learned Ms. Powers worked in Human Resources when she came to the press room. He went to Ms. Powers' office and provided her with a handwritten statement indicating the accident occurred on July 6, 2012. He indicated he asked Ms. Powers when the truck came that delivered the newspaper rolls. Her response was July 6, so he used that as the accident date. The note stated claimant waited two weeks before notifying Mr. Naab because claimant thought the pain would go away. The handwritten note also indicated he reported the accident to Human Resources on August 2, 2012. An accident report completed by Ms. Powers dated August 23, 2012, indicated the date of injury was July 6, 2012, and was reported on July 31, 2012. Claimant indicated both dates on the accident report were incorrect.

With regard to the accident date, claimant testified: "The dates, I'm a little bit off on my dates because of the prior accident that I had on my ankle, which I seen so many different doctors for."<sup>4</sup>

Ms. Powers testified claimant reported his right shoulder injury to her on July 31, 2012. He told her he injured the right shoulder while unloading a truck of news print, but did not know the date. Ms. Powers did not know where claimant got the July 6 date that

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<sup>2</sup> Claimant Depo. (July 18, 2013), Ex. 1.

<sup>3</sup> Claimant testified he spoke to Kerri Woods and indicated Ms. Woods and Ms. Powers are the same person.

<sup>4</sup> Claimant Depo. (July 18, 2013) at 24.

was in the handwritten note he gave her. She testified she investigated when the monthly truckloads of newspaper rolls arrived and determined the June 2012 delivery was on June 11 and the July 2012 delivery was on July 9. She denied telling claimant the dates the truckload of newspaper rolls arrived.

Ms. Powers testified it was after claimant began bringing her notes from doctor appointments that she understood claimant was filing a workers compensation claim for his shoulder. Exhibit F to her deposition is a photocopy of three work status notes from medical providers – one dated July 5, 2012; one dated August 1, 2012; and one dated August 13, 2012. Ms. Powers indicated the notes were brought to her at different times, but at least one of them was received on August 20, 2012. Ms. Powers testified that on August 20, claimant stated he may have been mistaken and his injury may have occurred in June. She also acknowledged she was told by Mr. Naab that he was informed by claimant of his right shoulder injury. She also confirmed Mr. Naab indicated he told claimant there was no one in Human Resources to whom he could report the right shoulder injury.

Claimant's medical records from July 14, 2012, through January 6, 2013, including those of Ms. Snodgrass, were not placed into evidence with the exception of the aforementioned work status notes.

Claimant was first examined by Dr. Severud on January 8, 2013. A form entitled "Problem or Accident/Injury Information" in Dr. Severud's records indicated claimant injured his right shoulder on August 5 or 6,<sup>5</sup> 2012, while helping a friend unload a truck carrying paper. Dr. Severud's notes indicated claimant injured his right shoulder on August 8, 2012, while helping a friend load some papers. On January 30, 2013, Dr. Severud performed a diagnostic arthroscopy of claimant's right shoulder with arthroscopic subacromial decompression, partial acromioplasty and CA ligament release, arthroscopic distal clavicle resection and arthroscopic rotator cuff repair.

Dr. Severud provided follow-up care through April 2, 2013. Claimant was also provided aftercare through March 4, 2014, by Ms. Snodgrass. On February 11, 2014, Ms. Snodgrass diagnosed claimant with, among other things, degenerative arthritis of the shoulder, cervical radiculopathy and neck pain. Ms. Snodgrass indicated in her March 4, 2014, notes: "[W]e have attempted multiple times to get epidural schedule[d] apparently the insurance has no clue what they are doing or understand the importance of this procedure I I [*sic*] guess they can just pay for neck surgery."<sup>6</sup>

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<sup>5</sup> The date is handwritten and the day appears to be either the 5th or 6th.

<sup>6</sup> Stipulation, Ex. 7.

On September 30, 2013, claimant was deposed a second time in an attempt to ascertain his date of accident. Prior to the deposition, claimant was provided information regarding the dates the newspaper rolls were delivered to respondent in June and July 2012. Claimant indicated his right shoulder injury occurred on June 11, 2012, while unloading the truckload of newspaper rolls.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>7</sup> “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”<sup>8</sup>

Respondent argues claimant is not credible as he alleged several different dates of accident. Respondent describes claimant’s testimony as so erratic and unreliable that it should be disregarded. Respondent then concludes because claimant is not credible, he failed to prove he sustained a right shoulder injury on June 11, 2012, as a result of unloading a truck at work. This Board Member disagrees with respondent’s contentions.

Admittedly, claimant was uncertain about his date of accident until his second deposition. Claimant provided several different dates of accident during testimony, to Ms. Powers and to medical providers. Claimant has consistently maintained he injured his right shoulder while unloading newspaper rolls from a truck. Neither the co-worker who helped claimant unload the truck, nor claimant’s supervisor, Mr. Naab, testified. Therefore, claimant’s testimony that he sustained a right shoulder injury while unloading newspaper rolls is uncontroverted. The fact that claimant had difficulty remembering the exact date he was injured does not make his testimony unreliable or untrustworthy. This Board Member is mindful of the well established maxim of workers compensation law that uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.<sup>9</sup>

Claimant received extensive and extended medical treatment from July 5, 2012, through March 4, 2014, including a right rotator cuff surgical repair. No evidence was presented by respondent that claimant’s right shoulder injury was caused in any other manner than that described by claimant. The overwhelming evidence shows claimant

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<sup>7</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>8</sup> K.S.A. 2011 Supp. 44-508(h).

<sup>9</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

sustained a right shoulder injury by accident arising out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>10</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>11</sup>

**WHEREFORE**, the undersigned Board Member affirms the June 18, 2014, preliminary hearing Order entered by ALJ Fuller.

Respondent and its insurance carrier filed their application for review in this appeal under Docket Nos. 1,060,138 and 1,069,634. As it appears the appeal under Docket No. 1,060,138 was made in error, the Board dismisses that appeal.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 2014.

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HONORABLE THOMAS D. ARNHOLD  
BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge

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<sup>10</sup> K.S.A. 2013 Supp. 44-534a.

<sup>11</sup> K.S.A. 2013 Supp. 44-555c(j).